IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S MOTION IN LIMINE TO PRECLUDE DEFENDANTS FROM MAKING CERTAIN CATEGORIES OF REFERENCES TO ITS PRIVATE COUNSEL

Plaintiff, the State of Oklahoma ("the State"), respectfully moves this Court for an order precluding Defendants from making certain categories of references to its counsel in, without limitation, voir dire, direct examination, cross-examination and argument. Specifically, the State seeks an order precluding Defendants from: (1) making reference to the fact that certain of the State's private counsel are from out-of-state; (2) making reference to the fact that the State's private counsel are not State employees; (3) making reference to the fact that the State's private counsel have been retained under a contingency fee contract; (4) making reference to the fact that if the State prevails the State's private counsel may be paid in whole or in part from the State's recovery or by Defendants; (5) making reference to the fact that the State's private counsel have advanced the costs of this litigation (including the costs of retaining expert witnesses); (6) making reference to the fact that certain of the State's counsel previously represented the State in its lawsuit against the tobacco industry; and (7) making reference to the fact that certain of the State's counsel have made contributions to political campaigns. In support of this Motion, the State states as follows:

I. Legal Standard

"Evidence which is not relevant is not admissible." Fed. R. Evid. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Moreover, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

II. Argument

1. In an effort to distract attention from their pollution-causing conduct in the Illinois River Watershed, Defendants have signaled an improper intention to try to make this case about the State's private counsel. However, it is the State -- not its counsel -- that is the plaintiff in this action. *See* DKT #1062 (Feb. 26, 2007 Protective Order, pp. 2-3), ("[T]he true party is the State of Oklahoma . . . . The state . . . is the real party in interest and is the Plaintiff in this action"). As such, references to the State's counsel of the sort detailed below are not only irrelevant, but also would confuse the issues and mislead the jury. They are, in short, improper under the Federal Rules of Evidence and should be precluded.

2. The fact that certain of the State's private counsel are from out-of-state is irrelevant to any issue in this case as it does not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See* Fed. R. Evid. 401 & 402. The sole reason for raising this issue would be to attempt to influence the jury through appeals to regional bias. This would be improper. *See, e.g., Pappas v. Middle Earth Condominium Association*, 963 F.2d 534, 541 (2d

Cir. 1992) ("an appeal to the jury's regional bias is so inherently improper as to raise the distinct possibility that regionalism infected the trial, and this danger is one a trial court could and should prevent either by sustaining an objection or giving a specific curative instruction. No verdict may stand when it is found in any degree to have been reached as a result of appeals to regional bias or other prejudice"). Thus, such references should be precluded. *See, e.g.*, Ex. 1 (Sept. 15, 2008 Order in *Viloria v. State Farm Fire & Casualty Co.*, 2:07-cv-6915 (E.D. La.)) ("Because the Court finds that, absent a showing at trial as to the relevance of such evidence, any testimony concerning Counsel's place of residence or employment is irrelevant under Federal Rules Evidence 401 and 402"); Ex. 2 (June 26, 2007 Minute Order in *Tsakonas v. Nextel Communications*, 2:04-cv-1363 (D.N.J.)).

3. That the State's private counsel are not State employees, that they have been retained under a contingency fee contract, and that if the State prevails the State's private counsel may be paid in whole or in part from the State's recovery or by Defendants are all irrelevant to any issue in this case as they do not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See* Fed. R. Evid. 401 & 402. Indeed, this Court has previously denied Defendants' motion to disqualify the State's outside counsel on the alleged ground that their retention violated the due process provisions of the Oklahoma and United States constitutions and the separation-of-powers provisions of the Oklahoma Constitution. *See* DKT #1187. This Court has also previously denied Defendants' motion to certify these issues to the Tenth Circuit Court of Appeals and the Oklahoma Supreme Court. *See* DKT #1437. Moreover, contingency fee contracts are sanctioned by both Oklahoma statute and the Oklahoma Rules of Professional Conduct. *See* 5 Okla. Stat. § 7; Okla. R. Prof. Cond. 1.5(c). Accordingly, any such

references should be precluded. *See, e.g., Falise v. The American Tobacco Co.*, 2000 U.S. Dist. LEXIS 22344, *4 (E.D.N.Y. Jan. 30, 2000) (J. Weinstein) ("Plaintiffs' motion *in limine* to exclude reference to the 25% contingency fee received by attorneys representing Trust claimants is granted"); *Pucci v. Litwin*, 1993 U.S. Dist. LEXIS 13902, *1 (N.D. Ill. Oct. 1, 1993) ("Plaintiffs' first motion *in limine* seeks to preclude defendants from referring to the fact that [plaintiffs' law firm] will be paid on partial contingency. Such evidence would be irrelevant and prejudicial. Accordingly, plaintiffs' first motion *in limine* is granted"); *Dominguez v. Four Winds Int'l Corp.*, 2009 U.S. Dist. LEXIS 43515, *2-3 (S.D. Cal. May 22, 2009) (granting motion in limine to prevent defendant or its counsel from making any mention of availability of attorneys fees to prevailing plaintiffs, reasoning that "attorneys' fees have no meaningful connection to issues of liability"); *L.W. v. Knox County Board of Education*, 2008 U.S. Dist. LEXIS 42200, *12-13 (E.D. Tenn. 2008) (precluding defendants from referencing subject of attorneys' fees in case with fee-shifting provision).

4. The fact that the State's private counsel have advanced the costs of this litigation is also irrelevant to any issue in this case as it does not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See* Fed. R. Evid. 401 & 402. Moreover, advances of litigation expenses are ethical. *See* Okla. R. Prof. Cond. 1.8(e). In particular, but without limitation, it appears that Defendants intend to improperly refer to the State's expert witnesses as *Motley Rice's* expert witnesses (or words to that effect) based on the fact that the State's private counsel have advanced the costs of litigation in this case. *See, e.g.,* Ex. 3 (9/3/08 Fisher Depo. at p. 70 (question by Defendants' counsel referring to "Motley Rice's expert team"), p. 71 (question by Defendants' counsel referring to "experts hired by Motley Rice"), p. 147

("experts being paid by Motley Rice"), p. 317 (question by Defendants' counsel referring to "expert team assembled by Motley Rice")); Ex. 4 (9/10/08 Olsen Depo., p. 93 (question by Defendants' counsel referring to "Motley Rice's experts")). Not only do these references ignore the well-recognized practice that "[l]awyers often advance the fees and costs of expert assistance in tort litigation," *see, e.g., Ivey v. Harney*, 47 F.3d 181, 186 (7th Cir. 1995), but also they ignore the fact that private counsel's contract with the State specifically requires approval by the Attorney General of all experts retained in this action. *See* Ex. 5 at ¶¶ 1-2 (Contract for Legal Services).[1] Simply put, the fact that the State has advanced the costs of litigation in this case does not make these expert witnesses "Motley Rice's experts," "Motley Rice's expert team," etc. Such characterizations of the State's experts, as well as any other direct or indirect references to the fact that the State has advanced the costs of litigation, are not only irrelevant, but also -- even assuming arguendo that they were relevant -- would confuse the issues and mislead the jury. *See* Fed. R. Evid. 401, 402 & 403.

5. The fact that certain of the State's private counsel previously represented the State in its lawsuit against the tobacco industry is irrelevant to any issue in this case as it does not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See* Fed. R. Evid. 401 & 402; *see also Beck v. Koppers, Inc.*, 2006 U.S. Dist. LEXIS 17866, *4 (N.D. Miss.

[1] Paragraph 1 of the Contract for Legal Services states in pertinent part that: "The Attorney General. . . shall have overall control and direction of the litigation, including but not limited to . . . approval of experts to be used in the suit as consultants or witnesses." *See* Ex. 5. Paragraph 2 underscores the point: "The lawyers shall consult with and obtain the prior written approval of the Attorney General or his designee concerning major issues affecting the suit, including but not limited to . . . selection of consultants, experts and other professional services . . . ." *See* Ex. 5.

Apr. 3, 2006) (granting motion to preclude evidence of counsel's representation of same party in other lawsuits).

6. The fact that certain of the State's counsel have made contributions to political campaigns[2] is irrelevant to any issue in this case as it does not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See* Fed. R. Evid. 401 & 402.

III. Conclusion

WHEREFORE, premises considered, the State's motion for an order precluding Defendants from making certain categories of references to its counsel in, without limitation, voir dire, direct examination, cross-examination and argument should be granted.

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628
ATTORNEY GENERAL
Kelly H. Burch OBA #17067
ASSISTANT ATTORNEYS GENERAL
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921

/s/Robert A. Nance
M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
David P. Page OBA #6852
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

[2] Defendants have listed as exhibits various campaign contribution reports. *See* Defendants' Joint Exhibit List, DJX 8025-8053.

Louis W. Bullock OBA #1305
Robert M. Blakemore OBA 18656
BULLOCK, BULLOCK & BLAKEMORE
110 West Seventh Street Suite 707
Tulsa OK 74119
(918) 584-2001

Frederick C. Baker
(admitted *pro hac vice*)
Elizabeth C. Ward
(admitted *pro hac vice*)
Elizabeth Claire Xidis
(admitted *pro hac vice*)
MOTLEY RICE, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

William H. Narwold
(admitted *pro hac vice*)
Ingrid L. Moll
(admitted *pro hac vice)*
MOTLEY RICE, LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676

Jonathan D. Orent
(admitted *pro hac vice)*
Michael G. Rousseau
(admitted *pro hac vice)*
Fidelma L. Fitzpatrick
(admitted *pro hac vice)*
MOTLEY RICE, LLC
321 South Main Street
Providence, RI 02940
(401) 457-7700

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General — fc_docket@oag.state.ok.us
Kelly H. Burch, Assistant Attorney General — kelly_burch@oag.state.ok.us

M. David Riggs — driggs@riggsabney.com
Joseph P. Lennart — jlennart@riggsabney.com
Richard T. Garren — rgarren@riggsabney.com
Sharon K. Weaver — sweaver@riggsabney.com
Robert A. Nance — rnance@riggsabney.com
D. Sharon Gentry — sgentry@riggsabney.com
David P. Page — dpage@riggsabney.com
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS

Louis Werner Bullock — lbullock@bullock-blakemore.com
Robert M. Blakemore — bblakemore@bullock-blakemore.com
BULLOCK, BULLOCK & BLAKEMORE

Frederick C. Baker — fbaker@motleyrice.com
Lee M. Heath — lheath@motleyrice.com
Elizabeth C. Ward — lward@motleyrice.com
Elizabeth Claire Xidis — cxidis@motleyrice.com
William H. Narwold — bnarwold@motleyrice.com
Ingrid L. Moll — imoll@motleyrice.com
Jonathan D. Orent — jorent@motleyrice.com
Michael G. Rousseau — mrousseau@motleyrice.com
Fidelma L. Fitzpatrick — ffitzpatrick@motleyrice.com
MOTLEY RICE, LLC
Counsel for State of Oklahoma

Robert P. Redemann — rredemann@pmrlaw.net
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.

David C. Senger — david@cgmlawok.com

Robert E Sanders — rsanders@youngwilliams.com
Edwin Stephen Williams — steve.williams@youngwilliams.com
YOUNG WILLIAMS P.A.
Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.

John H. Tucker jtucker@rhodesokla.com
Theresa Noble Hill thill@rhodesokla.com
Colin Hampton Tucker ctucker@rhodesokla.com
Kerry R. Lewis klewis@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER & GABLE

Terry Wayen West terry@thewestlawfirm.com
THE WEST LAW FIRM

Delmar R. Ehrich dehrich@faegre.com
Bruce Jones bjones@faegre.com
Krisann C. Kleibacker Lee kklee@faegre.com
Todd P. Walker twalker@faegre.com
Christopher H. Dolan cdolan@faegre.com
Melissa C. Collins mcollins@faegre.com
Colin C. Deihl cdeihl@faegre.com
Randall E. Kahnke rkahnke@faegre.com
FAEGRE & BENSON, LLP

Dara D. Mann dmann@mckennalong.com
MCKENNA, LONG & ALDRIDGE LLP
Counsel for Cargill, Inc. & Cargill Turkey Production, LLC

James Martin Graves jgraves@bassettlawfirm.com
Gary V Weeks gweeks@bassettlawfirm.com
Woody Bassett wbassett@bassettlawfirm.com
K. C. Dupps Tucker kctucker@bassettlawfirm.com
Earl Lee "Buddy" Chadick bchadick@bassettlawfirm.com
Vincent O. Chadick vchadick@bassettlawfirm.com
BASSETT LAW FIRM

George W. Owens gwo@owenslawfirmpc.com
Randall E. Rose rer@owenslawfirmpc.com
OWENS LAW FIRM, P.C.
Counsel for George's Inc. & George's Farms, Inc.

A. Scott McDaniel smcdaniel@mhla-law.com
Nicole Longwell nlongwell@mhla-law.com
Philip Hixon phixon@mhla-law.com
Craig A. Merkes cmerkes@mhla-law.com
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC

Sherry P. Bartley sbartley@mwsgw.com
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC

Counsel for Peterson Farms, Inc.

John Elrod jelrod@cwlaw.com
Vicki Bronson vbronson@cwlaw.com
P. Joshua Wisley jwisley@cwlaw.com
Bruce W. Freeman bfreeman@cwlaw.com
D. Richard Funk rfunk@cwlaw.com
CONNER & WINTERS, LLP
Counsel for Simmons Foods, Inc.

Stephen L. Jantzen sjantzen@ryanwhaley.com
Paula M. Buchwald pbuchwald@ryanwhaley.com
Patrick M. Ryan pryan@ryanwhaley.com
RYAN, WHALEY, COLDIRON & SHANDY, P.C.

Mark D. Hopson mhopson@sidley.com
Jay Thomas Jorgensen jjorgensen@sidley.com
Timothy K. Webster twebster@sidley.com
Thomas C. Green tcgreen@sidley.com
Gordon D. Todd gtodd@sidley.com
SIDLEY, AUSTIN, BROWN & WOOD LLP

Robert W. George robert.george@tyson.com
L. Bryan Burns bryan.burns@tyson.com
Timothy T. Jones tim.jones@tyson.com
TYSON FOODS, INC

Michael R. Bond michael.bond@kutakrock.com
Erin W. Thompson erin.thompson@kutakrock.com
Dustin R. Darst dustin.darst@kutakrock.com
KUTAK ROCK, LLP
Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., & Cobb-Vantress, Inc.

R. Thomas Lay rtl@kiralaw.com
KERR, IRVINE, RHODES & ABLES

Frank M. Evans, III fevans@lathropgage.com
Jennifer Stockton Griffin jgriffin@lathropgage.com
David Gregory Brown
LATHROP & GAGE LC
Counsel for Willow Brook Foods, Inc.

Robin S Conrad rconrad@uschamber.com

NATIONAL CHAMBER LITIGATION CENTER

Gary S Chilton gchilton@hcdattorneys.com
HOLLADAY, CHILTON AND DEGIUSTI, PLLC
Counsel for US Chamber of Commerce and American Tort Reform Association

D. Kenyon Williams, Jr. kwilliams@hallestill.com
Michael D. Graves mgraves@hallestill.com
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON
Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.

Richard Ford richard.ford@crowedunlevy.com
LeAnne Burnett leanne.burnett@crowedunlevy.com
CROWE & DUNLEVY
Counsel for Oklahoma Farm Bureau, Inc.

Kendra Akin Jones, Assistant Attorney General Kendra.Jones@arkansasag.gov
Charles L. Moulton, Sr Assistant Attorney General Charles.Moulton@arkansasag.gov
Counsel for State of Arkansas and Arkansas National Resources Commission

Mark Richard Mullins richard.mullins@mcafeetaft.com
MCAFEE & TAFT
Counsel for Texas Farm Bureau; Texas Cattle Feeders Association; Texas Pork Producers Association and Texas Association of Dairymen

Mia Vahlberg mvahlberg@gablelaw.com
GABLE GOTWALS

James T. Banks jtbanks@hhlaw.com
Adam J. Siegel ajsiegel@hhlaw.com
HOGAN & HARTSON, LLP
Counsel for National Chicken Council; U.S. Poultry and Egg Association & National Turkey Federation

John D. Russell jrussell@fellerssnider.com
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, PC

William A. Waddell, Jr. waddell@fec.net
David E. Choate dchoate@fec.net

FRIDAY, ELDREDGE & CLARK, LLP
Counsel for Arkansas Farm Bureau Federation

Barry Greg Reynolds — reynolds@titushillis.com
Jessica E. Rainey — jrainey@titushillis.com
TITUS, HILLIS, REYNOLDS, LOVE,
DICKMAN & MCCALMON

Nikaa Baugh Jordan — njordan@lightfootlaw.com
William S. Cox, III — wcox@lightfootlaw.com
LIGHTFOOT, FRANKLIN & WHITE, LLC
Counsel for American Farm Bureau and National Cattlemen's Beef Association

Duane L. Berlin — dberlin@levberlin.com
LEV & BERLIN PC
Counsel for Council of American Survey Research Organizations & American Association for Public Opinion Research

Also on this 5th day of August, 2009 I mailed a copy of the above and foregoing pleading to:

Thomas C Green -- via email: tcgreen@sidley.com
Sidley, Austin, Brown & Wood LLP

Cary Silverman -- via email: csilverman@shb.com
Victor E Schwartz
Shook Hardy & Bacon LLP (Washington DC)

Dustin McDaniel
Justin Allen
Office of the Attorney General (Little Rock)
323 Center St, Ste 200
Little Rock, AR 72201-2610

Steven B. Randall
58185 County Rd 658
Kansas, Ok 74347

/s/Robert A. Nance